

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

Supreme Court
FILED
MAY 8 1991
OFFICE OF THE CLERK

No. 90-1014

IN THE
Supreme Court of The United States

October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

BRIEF AMICI CURIAE OF
THE RUTHERFORD INSTITUTE AND
THE RUTHERFORD INSTITUTES OF ALABAMA,
ARIZONA, ARKANSAS, CALIFORNIA, COLORADO,
CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
HAWAII, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA,
MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA,
NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA,
OREGON, PENNSYLVANIA, SOUTH CAROLINA,
TENNESSEE, TEXAS, VIRGINIA, WASHINGTON,
WEST VIRGINIA AND WISCONSIN,
IN SUPPORT OF PETITIONERS

John W. Whitehead
Counsel of Record
Alexis I. Crow
THE RUTHERFORD
INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

A. Eric Johnston
The Rutherford Institute of Alabama
2100 Southbridge, Suite 376
Birmingham, AL 35209

Douglas Drury
The Rutherford Institute of Arizona
P.O. Box 27155
Tempe, Arizona 85285

Lavenski R. Smith
The Rutherford Institute of Arkansas
1857 Choctaw Court
Fayetteville, Arkansas 72701

Stephen E. Hurst
The Rutherford Institute of California
755 Crest Drive
Encinitas, California 92024

Lynn Watwood
The Rutherford Institute of Colorado
1408 1/2 West Alaska Drive
Lakewood, Colorado 80228

Joseph Secola
The Rutherford Institute of Connecticut
P.O. Box 3196
Miford, Connecticut 06460

Thomas S. Neuberger
The Rutherford Institute of Delaware
Ninth Street Plaza
200 West Ninth Street, Ste. 702
Wilmington, Delaware 19801-1646

Stephen Hurm
The Rutherford Institute of Florida
P.O. Box 1177
Inverness, Florida 32651

Charles R. Adams, III
The Rutherford Institute of Georgia
P.O. Box 1376
Fort Valley, GA 31030

Jim Hochberg
The Rutherford Institute of Hawaii
Suite 2480, Mauka Towers
737 Bishop Street
Honolulu, Hawaii 96813

J. Brian Heller
The Rutherford Institute of Illinois
P.O. Box 411
Washington, Illinois 61571

Steven Graber
The Rutherford Institute of Kansas
100 North Main Street
Wiley Building, Suite 711
Hutchinson, Kansas 67501

Amy Dougherty
The Rutherford Institute of Kentucky
P.O. Box 21849
Lexington, Kentucky 40522

Richmond C. Odum
The Rutherford Institute of Louisiana
601 Street Ferdinand
Baton Rouge, Louisiana 70802

Craig L. Silver
The Rutherford Institute of Maryland
16045 Comprint Circle
Gaithersburg, Maryland 20877

David Melton
The Rutherford Institute of Michigan
979 Prairie, SW
Grandville, Michigan 49418

Thomas W. Strahan
The Rutherford Institute of Minnesota
1313 Fifth Street, S.E.
Suite 329C
Minneapolis, Minnesota 55414

Richard Duncan
The Rutherford Institute of Nebraska
P.O. Box 67134
Lincoln, Nebraska 68506

Thomas C. Whitford
The Rutherford Institute of New York
1671 East 16th Street, Suite 932
Brooklyn, New York 11229

Thomas Bush
The Rutherford Institute of North Carolina
1201 East Boulevard
Charlotte, North Carolina 28203

Robert R. Melnick
The Rutherford Institute of Ohio
Federal Building, Suite 300
18 North Phelps Street
Youngstown, Ohio 44503

Ronald Barber
The Rutherford Institute of Oklahoma
110 West 7th Street, 2nd Floor
Tulsa, Oklahoma 74119

Kelly E. Ford
The Rutherford Institute of Oregon
12275 S.W. Second Street
Beaverton, Oregon 97005

William Bonner
The Rutherford Institute of Pennsylvania
P.O. Box 602
12 Veterans Square
Media, Pennsylvania 19063

Russell Burke
The Rutherford Institute of South Carolina
1441 Main Street
P.O. Drawer 2426
Columbia, South Carolina 29202

Larry Craun
The Rutherford Institute of Tennessee
105 Westpark Drive, Suite 450
Brentwood, Tennessee 37027

W. Charles Bundren
The Rutherford Institute of Texas
901 Main Street, Suite 6000
Dallas, Texas 75202

James Knicely
The Rutherford Institute of Virginia
P.O. Box Drawer GK
Williamsburg, Virginia 23187

W. Theodore Vander Weil, Esq.
The Rutherford Institute of Washington
Bellevue Place, Suite 376
800 Bellevue Way, N.E.
Bellevue, Washington 98004

Randall Trautwein
The Rutherford Institute of West Virginia
Morris Building, Suite 200
845 Fourth Avenue
Huntington, West Virginia 25701

Craig L. Parshall
The Rutherford Institute of Wisconsin
Tri-City Bank Building
N96W18221 County Lane Road
Menomonee Falls, Wisconsin 53051

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
 I. Exclusion of prayer at public school graduation ceremonies is unconstitutional censorship by the government	 3
II. Graduation ceremonies on public school grounds constitute a limited public forum	4
III. Respondent seeks content-based exclusions of speech in a limited public forum	7
IV. The Constitution prohibits content-based exclu- sions of speech in a limited public forum absent a compelling state interest	8
V. Establishment Clause concerns in this case are insufficient to satisfy the requirement of a com- pelling state interest	10
VI. The unconstitutional content-based exclusion sought by Respondent is not related to any sufficiently compelling state interest and does not qualify as a reasonable restriction	15
 CONCLUSION	 17

TABLE OF AUTHORITIES

CASES	PAGE
<i>Abington School Dist. v. Schempp</i> , 374 U.S. 203 (1963)	12, 14
<i>Adderley v. Florida</i> , 385 U.S. 39 (1966)	5
<i>Allegheny County v. ACLU</i> , 109 S. Ct. 3086 (1989)	14
<i>Bender v. Williamsport Area School Dist.</i> , 475 U.S. 534, <i>reh'g denied</i> , 476 U.S. 1132 (1986)	11
<i>Board of Educ. v. Pico</i> , 457 U.S. 853 (1982)	9
<i>Board of Educ. of Westside Community Schools v. Mergens</i> , 110 S. Ct. 2356 (1990)	12, 14
<i>Boos v. Barry</i> , 485 U.S. 312 (1988)	9
<i>Cameron v. Johnson</i> , 390 U.S. 611 (1968)	16
<i>Clark v. Community for Creative Non-Violence</i> , 468 U.S. 288 (1984)	9
<i>Consolidated Edison Co. v. Public Serv. Comm'n</i> , 447 U.S. 530 (1980)	16
<i>Cornelius v. NAACP Legal Defense & Ed. Fund</i> , 473 U.S. 788 (1985)	<i>passim</i>
<i>El-Amin v. West</i> , No. 88-0278-R, LEXIS 17511 (E.D. Va. 1988)	10
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	12, 14
<i>Erznoznik v. Jacksonville</i> , 422 U.S. 205 (1975)	10
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947)	10, 11
<i>Frisby v. Schultz</i> , 487 U.S. 474 (1988)	15
<i>Greer v. Spock</i> , 424 U.S. 828 (1976)	5, 16
<i>Gregoire v. Centennial School Dist.</i> , 907 F.2d 1366 (3d Cir.), <i>cert. denied</i> , 111 S. Ct. 253 (1990)	5, 6
<i>Hazlewood School Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988)	12
<i>Healy v. James</i> , 408 U.S. 169 (1972)	7

<i>Heffron v. Int'l Soc'y for Krishna Consciousness</i> , 452 U.S. 640 (1981)	16
<i>Hynes v. Mayor of Oradell</i> , 425 U.S. 610 (1976)	16
<i>Jaffree v. Wallace</i> , 705 F.2d 1526 (11th Cir. 1983), <i>aff'd</i> , 466 U.S. 924 (1984)	12
<i>Jones v. North Carolina Prisoners' Labor Union</i> , 433 U.S. 119 (1977)	5
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1970)	13
<i>Lynch v. Donnelley</i> , 465 U.S. 668 (1984)	14
<i>Madison Joint School Dist. v. Wisconsin Emp. Rel. Comm'n</i> , 429 U.S. 167 (1976)	5, 6
<i>Metromedia, Inc. v. San Diego</i> , 453 U.S. 490 (1981)	9, 16
<i>Perry Educ. Ass'n v. Perry Local Educators' Ass'n</i> , 460 U.S. 37 (1983)	<i>passim</i>
<i>Police Dept. of Chicago v. Mosley</i> , 408 U.S. 92 (1972)	7, 9
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	3
<i>Rivera v. East Otero School Dist. R-I</i> , 721 F. Supp. 1189 (D. Colo. 1989)	10, 15
<i>Schneider v. State</i> , 308 U.S. 147 (1939)	16
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	5
<i>Student Gov't Ass'n v. Bd. of Trustees of Univ. of Mass.</i> , 868 F.2d 473 (1st Cir. 1989)	6
<i>Talley v. California</i> , 362 U.S. 60 (1960)	16
<i>Travis v. Oswego-Appalachian School Dist.</i> , No. 90-7689, LEXIS 3502 (2d Cir. 1991)	4
<i>U.S. v. O'Brien</i> , 391 U.S. 367 (1968)	15
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985)	12, 14

<i>Weisman v. Lee</i> , 728 F. Supp. 68 (D.R.I.), 908 F.2d 1090 (1st Cir. 1990)	<i>passim</i>
<i>White v. City of Norwalk</i> , 900 F.2d 1421 (9th Cir. 1990)	10
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	<i>passim</i>
<i>Wiest v. Mt. Lebanon School Dist.</i> , 457 Pa. 166, 320 A.2d 362, cert. denied, 419 U.S. 967 (1974)	12, 13, 15
<i>Wood v. Mt. Lebanon Township School Dist.</i> , 342 F. Supp. 1293 (W.D. Pa. 1972)	13
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. I	<i>passim</i>
OTHER AUTHORITIES	
Farber & Nowak, <i>The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication</i> , 70 Va. L. Rev. 1219 (1984)	3
A. Fink, <i>Evaluation of Commencement Practices in American Public Secondary Schools</i> (1940)	6
M. Gunn, <i>A Guide to Academic Protocol</i> (1969)	6
M. Nimmer, <i>Nimmer on Freedom of Speech</i> (1984 student ed.)	4
K. Sheard, <i>Academic Heraldry in America</i> (1969)	6
J. Whitehead, <i>The Rights of Religious Persons In Public Education</i> (1991)	6

IN THE
Supreme Court of The United States

October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

BRIEF AMICI CURIAE
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This case is not about an establishment of religion by the government. Those who framed the United States Constitution never contemplated that the First Amendment ~~Establishment Clause~~¹ would be used to prohibit a simple invocation or that a benediction at a public school graduation ceremony could amount to the establishment of religion. This case is really about censorship and, if decided wrongly, its consequences could be the eradication of any religious message, reference and symbol from American public life. This would be a fundamental change in the nature of American society.

¹ The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

Amici curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With thirty-one state chapters, three international chapters, and an international headquarters in Charlottesville, Virginia, *amici curiae* assist litigants and participate in significant cases relating to the freedom of speech of religious persons in public schools and universities. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in numerous cases before this Court. *Amici curiae* believe the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts set forth in Petitioners' Brief filed with this Court.

SUMMARY OF ARGUMENT

Public school graduation ceremonies constitute a limited public forum designated by the school for public activities related to graduation. As such, wholly content-based exclusion of religious speech which is consistent with appropriate graduation themes is unconstitutional absent a compelling state interest in such an exclusion. Establishment Clause concerns are insufficient because of the lack of significant governmental action other than designation of the forum and institution of reasonable time, manner and place restraints designed to reserve the forum for its intended purpose. Respondent has identified no other state interest recognized by this Court as compelling and, thus, cannot be allowed to use the government and the United States Constitution to further his vicarious censorship. Furthermore, the exclusion sought by Respondent is facially overbroad and unreasonable and, therefore, cannot qualify as a reasonable time, manner or place restraint. Therefore, the content-based exclusion of religious speech at public school graduation ceremonies in a designated public forum is unconstitutional and may not be permitted by this Court.

ARGUMENT

I. Exclusion of Prayer at Public School Graduation Ceremonies Is Unconstitutional Censorship by the Government.

One of the core values of the First Amendment to the United States Constitution² is its prohibition of censorship. This core value is especially critical where the government seeks completely to prohibit a particular message or a category of speech. Such prohibitions greatly impede informed citizenship and impair individual freedom to develop and express ideas. As Justice Byron White has said: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee....It is one right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

The danger in this case is that "[t]he government might well achieve large-scale censorship by small steps in many separate contexts, each appearing reasonable by itself." Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1242 (1984). Respondent is asking this Court to take just such a "small" step by prohibiting the simple act of prayer at public school graduation ceremonies. Such a prohibition may appear reasonable to some, or at least a matter *de minimis*. However, such an exclusion is, in reality, yet another step toward large-scale censorship of religion and wholesale eradication of religious messages, references and symbols from American public life.

The censorship Respondent seeks from this Court is constitutionally impermissible. In fact, as *amici curiae* will show, this Court's reasoning on similar issues leads to the inescapable conclusion that accommodation of prayer at public school graduation ceremonies is

² The First Amendment says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

not only constitutionally permissible, it is constitutionally *mandated* under this Court's public forum doctrine.

II. Graduation Ceremonies on Public School Grounds Constitute a Limited Public Forum.

This Court has "adopted a forum analysis" as a means of balancing the government's interest in reasonably controlling access to its forums against the nation's commitment to a vigorous and free exchange of ideas. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985).

The limited, or designated,³ public forum is the second category of the three-part forum analysis developed by this Court. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Cornelius*, 473 U.S. at 802. This Court has defined the limited public forum as "public property which the State has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. In *Cornelius*, *supra*, this Court explained further that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by *certain speakers*, or for the discussion of *certain subjects*." *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45 and 46, n.7) (emphasis supplied).

Determination of forum classification is based upon two factors. The first factor concerns the *intent* of the government to open the forum, including the compatibility of the forum with expressive activity. *Cornelius*, 473 U.S. at 802. The second factor concerns the *extent* of use granted by the state. *Perry*, 460 U.S. at 49.

³ There is some controversy concerning the possible distinction between a limited public forum and a designated forum. See M. Nimmer, *Nimmer on Freedom of Speech*, Section 4.09[D] n. 168 (1984 student ed.). The Second Circuit has recently recognized the limited public forum as a subcategory of the designated public forum. *Travis v. Oswego-Appalachian School Dist.*, No. 90-7689, LEXIS 3502 (2d Cir. 1991) (religious group use of school auditorium). In *Travis*, the Second Circuit defined the limited public forum as that created "when government opens a nonpublic forum but limits expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Id.* The court held that the expressive activity was within the "category of speech" that the government had allowed previously. Acknowledging that such use does not open the forum to any and all expression, the court held that it did open the forum to expression consistent with the category of expression previously permitted. *Id.* (emphasis supplied). *Amici curiae* use the terms interchangeably.

In *Cornelius*, *supra*, this Court recognized that if not expressly indicated, intent to designate a forum may be found by looking at the government's policy and practice. *Cornelius*, 473 U.S. at 802. See also *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (university policy of making facilities available to registered student groups created public forum for their use); *Madison Joint School Dist. v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167 (1976) (statute providing for open school board meetings created forum for citizen involvement); and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal auditorium and city-leased theaters designed for and dedicated to expressive activities created public forum). In the present case, the intent of the school administration to open the forum to expressive activity is clear. The policy of the school is to allow a member of the clergy to give a brief invocation and benediction at its graduation ceremonies. *Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990). Furthermore, it is evident from the Agreed Statement of Facts that the school administration opened the forum to clergy of all faiths by allowing speakers from different religions to participate.⁴ See Respondent's Brief in Opposition to Petition for Writ of Certiorari, app. at A-4-A-8, *Weisman v. Lee* [Supreme Court No. 90-1014]).

Further, an inquiry into the "nature of the property and its compatibility with expressive activity" aids in the determination of intent. *Cornelius*, 473 U.S. at 802. See also *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (public forum not created where need for prison order and security is inconsistent with expressive activity); *Greer v. Spock*, 424 U.S. 828 (1976) (nature of military reservations not compatible with partisan political activities); *Adderley v. Florida*, 385 U.S. 39 (1966) (jailhouse grounds not compatible with public forum activities); and *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1371 (3d Cir.), *cert. denied*, 111 S. Ct.

⁴ Rather than eliminate graduation prayer, the dissent in *Weisman*, *supra*, urges schools to broaden participation in graduation ceremony invocations and benedictions by inviting even those with "non-religious" beliefs to participate. *Weisman*, 908 F.2d at 1099 (Campbell, Circuit Judge, dissenting). Judge Campbell explained: "In brief, I think the First Amendment values are more richly and satisfactorily served by inclusiveness than by barring altogether a practice most people wish to have preserved." *Id.* Although some speakers might use words consistent with their particular belief which might offend some, the next year it would be a different speaker with different beliefs. *Id.*

253 (1990) (after-school hours use of public school facilities compatible with expressive activities). As such, it is clear that prayer at graduation ceremonies is compatible with the nature of the graduation ceremony forum.⁵ The tradition of including invocations and benedictions in a graduation ceremony began in America at Harvard in 1642.⁶ The practice has become so ingrained in American commencement exercises that a typical commencement is described by one author as consisting of "an invocation, a commencement address, the awarding of earned degrees, the awarding of honorary degrees, and the benediction." K. Sheard, *Academic Heraldry in America* (1969).

The second factor in determining the existence of a limited public forum concerns the *extent of use granted by the state*. *Perry*, 460 U.S. at 46-47. In assessing the extent of use granted, the Court has scrutinized the "certain speakers" granted access and the "certain subjects" permitted to be discussed. *Cornelius*, 473 U.S. at 802.⁷ See also *Gregoire*, 907 F.2d at 1371.

The "certain speakers" in the present case before this Court are the outside individuals allowed to speak to the graduates during the ceremony, including those who give the invocation and benediction. *Weisman*, 728 F. Supp. at 69. Non-school speakers may also give a commencement address. The lower court opinions in *Weisman* do not record whether the school district allowed an outside speaker to address the students, but such an assumption is not unreasonable considering the elements of the traditional graduation ceremony. While not determinative, allowing an outside speaker to deliver the

⁵ It is important to note that a "physical situs" is not necessary for a forum to exist. *Student Gov't Ass'n v. Bd. of Trustees of Univ. of Mass.*, 868 F.2d 473, 476 (1st Cir. 1989). A public or limited public forum can be an "intangible channel of communication" such as the school's internal mail system in *Perry* and the fundraising drive in *Cornelius*. *Student Gov't.*, 868 F.2d at 476.

⁶ A. Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* (1940). See generally M. Gunn, *A Guide to Academic Protocol* (1969) and J. Whitehead, *The Rights of Religious Persons In Public Education* (1991).

⁷ This language was first recorded in a footnote to the *Perry* decision. *Perry*, 460 U.S. at 46, n.7. That footnote referenced *Widmar*, 454 U.S. 263 and *Madison Joint School Dist.*, 429 U.S. 167.

commencement address nonetheless further demonstrates the school's intent to open its forum.

The "certain subject" in the present case is the same in all graduation ceremonies: to encourage, inspire, and admonish the graduates to attain higher goals as they reflect on their past accomplishments. *Weisman*, 728 F. Supp. at 69. There can be no doubt that prayer at graduation ceremonies is consistent with this theme and was, in fact, consistent with this theme in the present case. As the dissenting circuit court judge noted:

It seems anomalous to outlaw Rabbi Gutterman's tolerant, benign, nonsectarian supplication—a message so entirely appropriate in that setting, and surely inoffensive to virtually all of those present.

Weisman, 908 F.2d at 1098 (Campbell, Circuit Judge, dissenting) (emphasis supplied).

In sum, when the school intentionally opened its forum to non-school persons for speech on commonly understood themes of graduation, it created a limited public forum for speech related to such themes, regardless of viewpoint or content.

III. Respondent Seeks Content-Based Exclusions of Speech in a Limited Public Forum.

Respondent and the lower courts "misconceive the nature" of this case. See *Widmar*, 454 U.S. at 273. "The question is not whether the creation of a religious forum would violate the Establishment Clause. . . . the question is whether it can exclude groups because of the content of their speech." *Widmar*, 454 U.S. at 273, citing *Healy v. James*, 408 U.S. 169 (1972).

This Court has said that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius*, 473 U.S. at 806. A restriction which proscribes speech solely because of its religious content is, of course, content-based. Content-based exclusions describe permissible speech in terms of its subject matter. See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Widmar*, *supra*, this Court held that excluding religious speech from a limited public forum was a content-based restriction.

Widmar, 454 U.S. at 269-70. In *Widmar*, the university had discriminated against student speakers because they wanted to engage in religious speech. This Court held that such speech was protected by the First Amendment and could not be forbidden absent a compelling state interest that would be served by a narrowly drawn restriction. *Id.*

The exclusion of speech sought by Respondent is *wholly content-based*. The speech sought to be proscribed is religious speech. The district court stated that nothing in its decision "prevents a cleric of any denomination or anyone else from giving a *secular* inspirational message at the opening and closing of the graduation ceremonies." *Weisman*, 728 F. Supp. at 74 (emphasis supplied). The only unconstitutionality found by the district court was that the word "God" was used in the invocation and benediction. *Id.* In fact, counsel for Respondent conceded during argument at trial that if the word "God" had been omitted from the Rabbi's prayer, the Establishment Clause would not be implicated. *Id.* at 74-75, n. 10.⁸

Certainly, then, there can be no doubt that the exclusion sought by Respondent is a content-based exclusion of religious speech.

IV. The Constitution Prohibits Content-Based Exclusions of Speech In a Limited Public Forum Absent a Compelling State Interest.

The state is not required indefinitely to retain the open character of a designated public forum. However, as long as the forum remains open, the state "is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. 46, citing *Widmar*, 454 U.S. at 269-70; see also *Cornelius*, 473 U.S. at 800.

⁸ Amazingly, the district court revised the benediction Rabbi Gutterman delivered by excluding the word "God" and set forth the revised version in a footnote to its opinion. *Weisman*, 728 F. Supp. at 75, n. 10. Moreover, both lower courts conceded that the issue centered on whether an invocation or benediction invoking a deity delivered by clergy at an annual public school graduation violated the Establishment Clause. *Weisman*, 728 F. Supp. at 70, and *Weisman*, 908 F.2d at 1090. In the words of district court Judge Boyle, "[t]he plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God." *Weisman*, 728 F. Supp. at 75.

As Justice Marshall wrote in *Mosley*, *supra*, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Justice Marshall noted:

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control....Necessarily, then...government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views....There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. *Selective exclusions from a public forum may not be based on content alone*, and may not be justified by reference to content alone.

Id. at 95-96 (citation omitted) (emphasis supplied).

To pass constitutional muster, this Court has made it very clear that a restraint on speech must be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (regulation restricting overnight sleeping to designated areas was constitutional since it was neutral with regard to the message presented by overnight sleeping in connection with demonstration against homelessness). See also *Boos v. Barry*, 485 U.S. 312 (1988) (city ordinance constituted unconstitutional content-based restriction on political speech in public forum that was not narrowly tailored to serve compelling state interest); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (school board has broad discretion regarding school affairs and may remove books from the school library that it finds to be "pervasively vulgar" or "educationally unsuitable"); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (city ordinance discriminating against billboard use on basis of content was facially unconstitutional); *Widmar*, 454 U.S. 263 (state university's

content-based exclusionary policy was not shown to be necessary to serve a compelling state interest and was not narrowly drawn to achieve that end); *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975) (city ordinance discriminating against movies solely on basis of content was facially invalid as infringement on First Amendment); *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) (city ordinance which proscribed personal, impertinent, slanderous or profane remarks in a limited public forum was constitutional); and *El-Amin v. West*, No. 88-0278-R, LEXIS 17511 (E.D. Va. 1988) (city created a limited public forum by, among other things, confining speech to a certain subject matter).

Respondent has demonstrated no such compelling interest in excluding the religious speech in question.

V. Establishment Clause Concerns In This Case Are Insufficient to Satisfy the Requirement of a Compelling State Interest.

This Court has dismissed the notion that simply including religious speech in a limited public forum is an advancement of religion inimicable to the Establishment Clause. See *Widmar*, 454 U.S. 272. Indeed, Justice Powell said:

We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. *It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases.*

Id. Thus, Respondent's quest for vicarious religious censorship cannot masquerade as Establishment Clause concerns that rise to the level of a compelling state interest sufficient to justify content-based exclusions of speech in this case.

This Court has emphasized that the Establishment Clause is not a bar to individual action. It is a limit on the federal and state governments. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). As one lower court has well articulated: "The threshold question in any Establishment Clause case is whether there is sufficient governmental action to invoke the prohibitions." *Rivera v. East Otero School Dist. R-1*, 721 F. Supp. 1189, 1195 (D. Colo. 1989) (emphasis supplied).

"It is clear that the mere fact that speech *occurs* on school property during a school ceremony does not make it government supported." *Id.* (emphasis supplied). Chief Justice Burger has said as well:

[T]he several commands of the First Amendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion.

Bender v. Williamsport Area School Dist., 475 U.S. 534, 553, *reh'g denied*, 476 U.S. 1132 (1986) (Burger, C.J., dissenting) (emphasis in original).

In *Everson, supra*, this Court catalogued the type of governmental actions that violate the Establishment Clause. These are: no official or state church; no coercion to attend or remain away from church or to profess a belief or disbelief in any religion; no punishment for religious beliefs or disbeliefs; no preference of one religion over another; no participation in the affairs of religious organizations or participation by religious organizations in the affairs of government; and no tax levied to support religious activities or institutions. *Everson*, 330 U.S. at 15-6. The government has taken none of these actions in this case.

In the present case, the only significant government action is *designation of the forum*.

- The government did not give the prayer. The rabbi that offered the prayer is a *private individual* and not an employee of the school. As Justice O'Connor has said: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school stu-

dents are mature enough and are likely to understand that a school does not endorse or support...speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. of Westside Community Schools v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (emphasis in original).

- The government did not compose the prayer. See *Engel v. Vitale*, 370 U.S. 421 (1962) (reading of state-composed, non-denominational, non-compulsory prayer in public schools violates Establishment Clause).
- The primary effect of the graduation ceremony in this case neither advances nor inhibits religion. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (state requirement for daily reading from the Bible in public school had primary religious effect even with provisions for excusal).
- The government's purpose in sponsoring the graduation ceremony is not to endorse religion. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (government's purpose for one-minute voluntary silent prayer in public schools was unconstitutional endorsement of religion).
- The government did not request the audience at the graduation ceremony to participate in the graduation prayer. See *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984) (joining with students by public school teacher to read prayer aloud during school day violates Establishment Clause).
- The government did not include graduation prayer as part of its required educational activities. See *Hazlewood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school newspaper may constitutionally limit content of newspaper that is written and published as part of journalism class coursework).
- Graduation ceremonies occur but one time a year so the risk of state indoctrination is remote. See *Wiest v.*

Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362, 370, *cert. denied*, 419 U.S. 967 (1974) (invocation and benediction at public high school graduation ceremonies were so remote from classroom or educational program involved that they did not constitute type of activity contemplated by Establishment Clause) and *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293, 1294 (W.D. Pa. 1972) (public high school graduation ceremony was not part of compulsory school curriculum and did not violate Establishment Clause).

Where there is governmental action which rises to an Establishment Clause concern, this Court has developed a three-part test to determine whether such governmental action amounts to a violation of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1970). The *Lemon* test is inapplicable to this case since there is no governmental action in connection with this graduation prayer that is significant enough to implicate the Establishment Clause. The only significant government action here is *designation of the limited public forum*.

Moreover, any argument for finding government "endorsement" of religion merely by *permitting prayer* at graduation simply is misplaced. Such does not rise to the level of an Establishment Clause concern. As this Court has held, merely designating a forum does not "confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274.

Of course, there is always a risk that someone might conclude that the state has approved a speaker's message whenever any speaker uses state property as a public forum.⁹ However, if mere apprehension of such a danger were enough to violate the Establishment Clause, no religious speaker could ever appear on state property. The fact is that this Court has clearly acknowledged the right of religious speakers

⁹ The logical absurdity of avoiding this risk entirely can be seen by considering the armed forces. The official United States military uniform could arguably be a limited public forum and, thus, some could conclude that prayer offered by a man in combat is a message approved by the state and thus an unconstitutional establishment of religion by the state.

to use public forums on equal terms with others using the forum. *Widmar*, 454 U.S. at 271.

Therefore, this Court's test of government endorsement is whether an observer seeing the overall religious display or presentation might *reasonably* conclude that the government is endorsing a religious message. See *Allegheny County v. ACLU*, 109 S. Ct. 3086 (1989) (nativity scene violated Establishment Clause) and *Lynch v. Donnelly*, 465 U.S. 668 (1984) (nativity display did not violate Establishment Clause). No such reasonable conclusion can be drawn from the present case.

It is apparent, then, that this Court views *context* as the single most important factor resolving the question of endorsement. As long as the religious display or presentation is part of a larger display or presentation and the larger ceremony or display is not reasonably seen as having a solely religious purpose or predominantly religious effect, such display or presentation does not implicate the Establishment Clause by way of government "endorsement." In the context of graduation ceremonies, an invocation and benediction simply do not render the event predominantly religious. Moreover, reasonable persons could not assert that the act of prayer at a graduation ceremony makes the purpose of the ceremony solely religious. Such an assertion is ludicrous.

Concerns regarding the risk of undue influence, and thus the "establishment" of religion, that this Court found in the classroom prayer and Bible-reading cases¹⁰ are ill-founded with respect to graduation ceremonies. The graduates involved in the present case are now young adults and "graduated" high school students who are able to distinguish between school-sponsored and school-permitted ideas. See *Mergens*, 110 S. Ct. at 2372. As Justice O'Connor noted in another case, ceremonial acknowledgments of religion are different than school prayer because they are "primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

¹⁰ *E.g.*, *Engel*, 370 U.S. 421 (1962); *Abington School Dist.*, 374 U.S. 203 (1963); *Wallace*, 472 U.S. 38 (1985).

VI. The Unconstitutional Content-Based Exclusion Sought by Respondent Is Not Related to Any Sufficiently Compelling State Interest And Does Not Qualify As a Reasonable Restriction.

Respondent has articulated no constitutionally cognizable state goal which would be furthered by excluding prayer from graduation ceremonies.

In order for the state, in the person of school officials, to justify prohibitions of a particular expression, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort that may accompany another viewpoint. *Rivera*, 721 F. Supp. at 1194. As one court has written:

No court can enjoin speech on the basis of an unsupported assertion that it may offend the sensibilities of some prospective listener. Neither we nor the hearing court could properly assume that those invited to deliver the invocation and benediction at the graduation ceremony would not take account of the public and ceremonial nature of the occasion and the presence of students and the adults of all persuasions. So too there is no basis for concluding that a speaker chosen to emphasize the seriousness of the public commencement would not fashion an appropriate message which neither requires any individual to participate in an affirmation which might run counter to his personal belief nor places the state's imprimatur on any sectarian declaration.

Wiest, 320 A.2d at 367 (Roberts, J., concurring) (citations omitted).

This Court has indicated that in order to justify its restrictions on speech, the state must show that the restriction furthers an important or substantial interest unrelated to the suppression of free expression and that the incidental restriction is no greater than is essential to the furtherance of that interest. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). See also *Frisby v. Schultz*, 487 U.S. 474 (1988) (state has significant interest in protecting residential privacy that justifies a narrowly tailored content-neutral ban on picketing which takes place solely in front of a particular residence); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (state has significant

interest in orderly movement of crowds at state fair which justifies content-neutral restriction on distribution, sales and solicitation activities to fixed location); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (state has significant interest in protecting citizens from crime and undue annoyance that justifies requiring door-to-door solicitors or canvassers to identify themselves to local officials; ordinance nevertheless invalid for vagueness); *Cameron v. Johnson*, 390 U.S. 611 (1968) (state interest in unimpeded ingress to and egress from public buildings compelling enough to justify barring picketing that obstructs or unreasonably interferes with it); and *Talley v. California*, 362 U.S. 60 (1960) (state interest in prevention of fraud, deceit, false advertising, negligent use of words, obscenity and libel inadequate to support prohibition of anonymous handbills). No such burden of proof can be met in this case.

This Court has said that the government may regulate the content of expression to "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable," *Perry*, 460 U.S. at 46 (emphasis supplied), and as long as such regulations are "viewpoint neutral." *Greer*, 424 U.S. 828 (regulations banning partisan political speeches and demonstrations not facially unconstitutional). See also *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). Constitutional reasonableness, however, requires that content-based restrictions on speech be narrowly tailored to serve the government's compelling interest in restricting the speech. *Widmar*, 454 U.S. at 268 and *Consolidated Edison*, 447 U.S. at 540. See also *Metromedia*, 453 U.S. 490. Such restrictions may not burden substantially more speech than is necessary to further the significant government interest. "The First Amendment hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic." *Consolidated Edison*, 447 U.S. at 537. See also *Schneider v. State*, 308 U.S. 147 (1939) (significant state interest in keeping streets clean does not justify barring all distribution of handbills since this would suppress a great quantity of speech that does not cause the evils sought to be prevented).

Petitioners do not disagree with the propriety of reasonable restrictions imposed on graduation speakers which would "reserve the forum for its intended purposes." See *Perry*, 460 U.S. at 46 and

Cornelius, 473 U.S. at 806. In fact, Petitioners have used great care to ensure that any prayers at its graduation ceremony are consistent with the tone and theme of such an important event. *Weisman*, 728 F. Supp. at 69.¹¹

Nonetheless, a complete ban on any mention of a deity in an invocation or benediction is much more than a regulation reserving the forum for its intended purpose. Moreover, Respondent is completely unable to fairly characterize the unbounded solely content-based exclusion of religious speech from public graduation ceremonies as a prohibition which is "narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46, citing *Widmar*, 454 U.S. at 269-70.

CONCLUSION

Drawn to its logical conclusion, a holding that excludes the mention of a deity in graduation invocations and benedictions would lead to complete religious censorship and the eradication of religion from American public life.

For example, if this Court holds that it is unconstitutional to mention a deity at the beginning of a graduation ceremony, the American pledge of allegiance would be prohibited because it mentions "one nation under God," patriotic anthems which use the word "God" would be prohibited, and any poem or other inspirational message that connotes a deity would be proscribed. America's Thanksgiving holiday and National Day of Prayer would be discontinued for their unconstitutionality and the President of the United States would dare not appear near the national Christmas tree for fear of "endorsing" religion and, therefore, acting unconstitutionally. The President as well would forever be forbidden to invoke God's blessing on our nation as he has done so many times. As the dissent at the court of appeals worried, courts might next be required to outlaw the reading of Walt Whitman or Keats at graduation ceremonies. *Weisman*, 908 F. 2d at 1097 (Campbell, Circuit Judge, dissenting).

¹¹ Petitioners' guidelines "suggest methods of composing 'public prayer in a pluralistic society,' stressing 'inclusiveness and sensitivity' in the structuring of non-sectarian prayer. The guidelines do not suggest the elimination of references to a deity as appropriate." *Weisman*, 728 F. Supp. at 69.

American schoolchildren are taught that they have the constitutional right to speak. It is ironic that, at the threshold of their educational adulthood, the government is asked to publicly abridge that right and censor the very speech that celebrates their graduation. Such censorship is a far cry from what our forefathers envisioned when they wrote the document that would govern this nation and protect our most treasured freedoms. Indeed, Petitioner requests that this Court consider the effect of its decision in this case upon America's schoolchildren. As the dissenting circuit judge below has so poignantly observed:

If one were to ask people what are the problems of our time, they would hardly respond that our youth and their parents are being corrupted by over-exposure to noble aspirations of this character [Rabbi Gutterman's prayer]....So what good, one might ask, is accomplished by preventing an invocation like this? The answer, of course, is that we are also concerned to preserve the separation of church and state...yet the question remains, is it necessary—to preserve separation of church and state—to prevent benedictions and invocations of this generous, inclusive sort?"

Weisman, 908 F.2d at 1098 (Campbell, Circuit Judge, dissenting). Petitioners believe that the Constitution is quite clear: censorship is not necessary and no constitutional good will be accomplished by obliterating prayer from public school graduation ceremonies.

Therefore, on behalf of Petitioners, *amici curiae* respectfully request that this Court reverse the court below and deny the religious censorship Respondent seeks and that this Court duly recognize and reinvigorate the constitutional mandate that religious speech be treated equally with all other speech permitted in a limited public forum.

Respectfully submitted,
John W. Whitehead
Counsel of Record
Alexis I. Crow
The Rutherford Institute
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888